

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF  
PROTECT LUDLOW BAY COMMITTEE,

Appellant,

v.

STATE OF WASHINGTON,  
DEPARTMENT OF ECOLOGY, and  
POPE AND TALBOT DEVELOPMENT,  
INC.,

Respondents.

PCHB No. 84-89

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, the appeal of a Regulatory Order issued under RCW 90.48.120(2) by Department of Ecology to respondent Pope and Talbot Development, Inc., came on for hearing before the Pollution Control Hearings Board, Lawrence J. Faulk, Gayle Rothrock, and Wick Dufford, Members, convened at Lacey, Washington, on November 19 and 26, 1984. Administrative Appeals Judge William A. Harrison presided. Respondent elected a formal hearing pursuant to RCW 43.21B.230.

Appellant appeared by its attorney, Philip M. Best. Respondent

1 Department of Ecology appeared by Charles W. Lean, Assistant Attorney  
2 General. Respondent Pope and Talbot Development, Inc., appeared by  
3 its attorney, Richard W. Elliott. Reporter Gene Barker provided  
4 reporting services.

5 Witnesses were sworn and testified. Exhibits were examined. From  
6 testimony heard and exhibits examined, the Pollution Control Hearings  
7 Board makes these

#### 8 FINDINGS OF FACT

##### 9 I

10 This matter concerns Port Ludlow, a private resort community on  
11 Port Ludlow Bay in Jefferson County. Respondent Pope and Talbot  
12 Development, Inc., has developed that resort community and operates a  
13 wastewater (sewage) collection and treatment system for the domestic  
14 waste which the resort community generates.

##### 15 II

16 The treatment plant is authorized to discharge treated waste into  
17 Port Ludlow Bay under the terms of National Pollutant Discharge  
18 Elimination System (NPDES) Permit No. WA-002120-2 issued by respondent  
19 Department of Ecology (DOE) on March 19, 1979.

##### 20 III

21 The NPDES permit of March 19, 1979, contains limitations upon  
22 effluent discharged from the treatment plant, addressing  
23 concentrations within the effluent. The quantity of effluent  
24 discharged is also limited. The latter limit is a monthly average of  
25 60,000 gallons per day (.06 mgd).

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1 IV

2 The 60,000 gallons per day limitation of the NPDES permit was  
3 apparently prescribed by reference to the manufacturers-rated capacity  
4 of the plant.

5 V

6 A device used to measure discharge by the treatment plant was  
7 found defective and replaced in 1983. Accurate measurement showed  
8 flows in excess of the 60,000 gpd limitation. This excess flow  
9 derived both from excessive numbers of sewer connections and the entry  
10 of storm water, ground water and sea water into the collection system  
11 by infiltration through cracks and openings in the pipes.

12 VI

13 The surging effect of infiltrating storm water has hydraulically  
14 overloaded the plant causing violation of NPDES concentration as well  
15 as flow limitations.

16 VII

17 Approximately 1,100 residential lots have been sold by Pope and  
18 Talbot at Port Ludlow. Of these, roughly 400 are connected to the  
19 wastewater collection system while 700 remain unconnected.

20 VIII

21 Pope and Talbot has sought renewal of its NPDES permit on terms  
22 which would allow expansion of its plant to accommodate all lots sold.

23 IX

24 The expanded treatment plant, even if approved, could not be  
25 constructed immediately. An interim period of two to three years may

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1 be required. Sewage must be treated under an improved version of the  
2 current system during this interim.

3 X

4 To address the interim period, DOE issued the subject Order (DE  
5 84-175) on March 20, 1984. In essence it required:

- 6 1. Improvements to the existing plant (paragraph 3).  
7 2. Elimination of all detectable sources of inflow  
8 and significant sources of infiltration (paragraph 2).  
9 3. Compliance with monthly average effluent  
10 concentration limits within the present NPDES permit  
11 (paragraph 4).  
12 4. A water quality study of Port Ludlow Bay  
13 (paragraph 1).

14 Contingent upon meeting requirements for plant improvements,  
15 infiltration reduction and adherence to concentration limits, as well  
16 as approval of the water quality study's scope, up to 70 additional  
17 sewer hookups were allowed by the order during the two-year interim  
18 period.

19 XI

20 Feeling aggrieved by the Order, appellants appealed to this Board  
21 on April 4, 1984.

22 XII

23 The Order (DE 84-175) specified a maximum of 70 hookups because  
24 that number is believed to correspond to the number of new homes  
25 likely to be built in the interim period. The flow added by those 70  
26 hookups would be more than offset by the required reduction in  
27 infiltration flow. The result should be a net reduction of flow.

XIII

The flow from the treatment plant, even as reduced on a net basis

1 by the Order (DE 84-175), will continue to exceed the NPDES flow  
2 limitation of 60,000 gpd, monthly average. The Order did not require  
3 adherence to that flow limitation. To so adhere would require  
4 disconnecting 100 or more homes from the sewer system, as well as  
5 total elimination of infiltration.

6 XIV

7 With the prescribed improvements to the existing plant (including  
8 a surge tank to handle storm events), and the prescribed reduction of  
9 infiltration flow, it is reasonable to expect that the concentration  
10 limits of the NPDES permit will be met under the Order (DE 84-175).

11 XV

12 At the flow resulting from operation of the treatment plant under  
13 the Order (DE 84-175) there should be no violation of water quality  
14 standards for Port Ludlow Bay.

15 XVI

16 Any Conclusion of Law which is be deemed a Finding of Fact is  
17 hereby adopted as such.

18 From these Findings of Fact, the Board comes to these

19 CONCLUSIONS OF LAW

20 I

21 This matter is the review of a Department of Ecology (DOE)  
22 Regulatory Order issued under RCW 980.48.120(2).

23 II

24 Pursuant to RCW 43.21B 170, we have adopted the following rule  
25 concerning the standard and scope of our review:

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1 WAC 371-08-183 Hearings--Standard and scope of  
2 review. (1) The Board will apply the specific  
3 criteria provided by law in making its decision on  
4 each case.

(2) Hearings shall be quasi-judicial in nature and  
shall be conducted de novo unless otherwise provided  
by law.

5 The meaning of this rule, in the context of this case, is that we will  
6 review the Regulatory Order under a de novo standard of review. This  
7 means more than determining whether regulatory discretion should be  
8 exercised (as/<sup>in</sup>judicial review by mandamus); it involves determination  
9 of whether the actual exercise of discretion was proper in this  
10 particular case.

### 11 III

12 Appellant contends that the subject DOE Order (DE 84-175) would  
13 allow the continuation of flows from the treatment plant in violation  
14 of the NPDES permit limitation of 60,000 gpd, monthly average. We  
15 agree. Moreover, the NPDES permit containing that flow limitation  
16 remains in effect until determination of the application for the  
17 renewed or new permit. RCW 34.04.170(1).

### 18 IV

19 The test for review of the subject Order (DE 84-175), however, is  
20 not whether it countenances any violation of the NPDES permit.  
21 Rather, the test is whether the Order is "appropriate under the  
22 circumstances" to "accomplish the purposes of chapter 90.48 RCW," the  
23 Water Pollution Control Act. RCW 90.48.120(2).

### 24 V

25 The policy of the Water Pollution Control Act, chapter 90.48 RCW,  
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1 is found at RCW 90.48.010:

2 90.48.010 Policy enunciated. It is declared to  
3 be the public policy of the state of Washington to  
4 maintain the highest possible standards to insure the  
5 purity of all waters of the state consistent with  
6 public health and public enjoyment thereof, the  
7 propagation and protection of wild life, birds, game,  
8 fish and other aquatic life, and the industrial  
9 development of the state, and to that end require the  
10 use of all known available and reasonable methods by  
11 industries and others to prevent and control the  
12 pollution of the waters of the state of Washington.  
13 Consistent with this policy, the state of Washington  
14 will exercise its powers, as fully and as effectively  
15 as possible, to retain and secure high quality for  
16 all waters of the state. The state of Washington in  
17 recognition of the federal government's interest in  
18 the quality of the navigable waters of the United  
19 States, of which certain portions thereof are within  
20 the jurisdictional limits of this state, proclaims a  
21 public policy of working cooperatively with the  
22 federal government in a joint effort to extinguish  
23 the sources of water quality degradation, while at  
24 the same time preserving and vigorously exercising  
25 state powers to insure that present and future  
26 standards of water quality within the state shall be  
27 determined by the citizenry, through and by the  
efforts of state government, of the state of  
Washington. (Emphasis added.)

17 The policy of preventing and controlling pollution applies to all  
18 sources. The policy of working cooperatively with the federal  
19 government in a joint effort to extinguish the sources of water  
20 quality degradation applies with particular force to "point" sources  
21 such as the treatment plant in question. With regard to point  
22 sources, DOE has adopted regulations for NPDES permits at chapter  
23 173-220 WAC.

VII

Within WAC 173-220-130<sup>1</sup> relating to NPDES permit requirements,

1. WAC 173-220-130 Effluent limitations, water quality standards and other requirements for permits. (1) Any permit issued by the department shall apply and insure compliance with all of the following whenever applicable:

(a) Effluent limitations under sections 301, 302, 306, and 307 of the FWPCA. The effluent limitations shall not be less stringent than those based upon the treatment facility design efficiency contained in approved engineering plans and reports or approved revisions thereto. The effluent limits shall reflect any seasonal variation in industrial loading.

For combined waste treatment facilities, the effluent limitations for biochemical oxygen demand or suspended solids may be adjusted upwards to a maximum allowed by applying effluent limitations pursuant to sections 301(b)(1)(B) or 301(h) of the FWPCA to the domestic portion of the influent and effluent limitations pursuant to sections 301(b)(1)(A)(i), 301(b)(2)A), and 301(b)(2)(E) of the FWPCA or standards of performance pursuant to section 306 of the FWPCA to the industrial portion of the influent: Provided, That the following additional condition is met:

Fecal coliform levels shall not exceed a monthly average of 200 organisms per 100 ml with a maximum weekly average of 400 organisms per 100 ml, unless a waiver is granted pursuant to section 301(h) of the FWPCA;

(b) Any more stringent limitation, including those:

(i) Necessary to meet water quality standards, treatment standards or schedules of compliance established pursuant to any state law or regulation under authority preserved to the state by section 510 of the FWPCA; or

(ii) Necessary to meet any federal law or regulation other than the FWPCA or regulations thereunder; or

(iii) Required to implement any applicable water quality standards; such limitations to include any legally applicable requirements necessary to implement total maximum daily loads established pursuant to section 303(d) and incorporated in the continuing planning process approved under section 303(e) of the FWPCA and any regulations and guidelines issued pursuant thereto;

(iv) Necessary to prevent or control pollutant discharges from plant site runoff, spillage or leaks, sludge or waste disposal, or raw material storage;



1 there is a distinction made between federally specified national  
2 concentration limits for effluent (subsection (1)(a)) and any more  
3 stringent limitation (subsections (1)(b)). We conclude that the flow  
4 limitation of 60,000 gpd, monthly average, within the Pope and Talbot  
5 NPDES permit was placed under authority of WAC 173-220-130(1)(b). As  
6 such, the apparent purpose of the flow limitation is not the  
7 implementation of national effluent standards, but simply the  
8 prevention and control of water pollution. See WAC  
9 173-220-130(1)(b)(iv).

10  
11  
12 (v) Necessary to provide all known, available and reasonable  
methods of treatment.

13 (c) Any more stringent legal applicable requirements necessary  
14 to comply with a plan approved pursuant to section 208(b) of the  
FWAPCA; and

15 (d) Prior to promulgation by the administrator of applicable  
16 effluent standards and limitations pursuant to sections 301, 302,  
306, and 307 of the FWPCA, such conditions as the department  
determines are necessary to carry out the provisions of the FWPCA.

17 (2) In any case where an issued permit applies the effluent  
18 standards and limitations described in subparagraph (a) of  
paragraph (1) of this section, the department shall make a finding  
that any discharge authorized by the permit will not violate  
applicable water quality standards.

19 (3) In the application of effluent standards and limitations,  
20 water quality standards and other legally applicable requirements  
pursuant to paragraphs (1) and (2) hereof, each issued permit  
21 shall specify average and maximum daily quantitative (in terms of  
weight) or other such appropriate limitations for the level of  
22 pollutants and the authorized discharge.

VIII

We conclude that the twin purposes of the Water Pollution Control Act, chapter 90.48 RCW, pertinent to this case are: 1) to impose federally specified national concentration limits for effluent discharged and 2) to prevent and control pollution.<sup>2</sup>

IX

The subject Order (DE 84-175) would require adherence to national concentration limits for effluent contained in the NPDES permit. Moreover, the subject Order (DE 84-175) imposes additional requirements to improve the existing treatment plant so that during an interim period, water pollution is not likely to occur despite flow levels in excess of the 60,000 gpd limitation of the NPDES permit. Compare Miotke v. Spokane, 101 Wn. 2d 307 (1984), wherein an order of DOE invited discharges in excess of national concentration limits contained in the NPDES permit, and where such discharges caused water pollution.

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2. "Pollution" is defined at RCW 90.48.020:

Whenever the word "pollution" is used in this chapter, it shall be construed to mean such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state, including change in temperature, taste, color, turbidity, or odor of the waters, or such discharge of any liquid, gaseous, solid, radioactive, or other substance into any waters of the state as will or is likely to create a nuisance or render such waters harmful, detrimental or injurious to the public health, safety or welfare, or to domestic, commercial, industrial, agricultural, recreational, or other legitimate beneficial uses, or to livestock, wild animals, birds, fish or other aquatic life.

X

We conclude that the Order of DOE (DE 84-175) is "appropriate under the circumstances" to "accomplish the purposes of chapter 90.48 RCW, the Water Pollution Control Act as required by RCW 90.48.120(2), and should be affirmed.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Board enters this

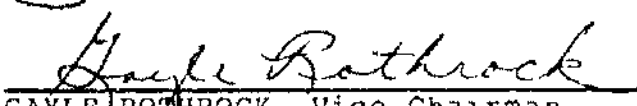
ORDER


Department of Ecology Regulatory Order (DE 84-175) is hereby affirmed.


DONE at Lacey, Washington, this 2<sup>nd</sup> day of February, 1985.

POLLUTION CONTROL HEARINGS BOARD

 2/22/85  
LAWRENCE J. FAUDK, Chairman

  
GAYLE ROTHROCK, Vice Chairman

  
WICK DUFFORD, Lawyer Member

  
WILLIAM A. HARRISON  
Administrative Appeals Judge